

# **2017 APAAC Annual Victim Advocate Conference**

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## **Do I Have to Tell? Handling Potentially Exculpatory Evidence as a Victim Advocate**

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## Do I Have to Tell?: Handling Potentially Exculpatory Evidence as a Victim Advocate

Thomas Forsyth  
Attorney Training Manager




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## *United States v. Berger*, 395 U.S. 78, 88 (1969)

"The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is **not that it shall win a case, but that justice shall be done**. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

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## Arizona Rules of Professional Responsibility

- ER 3.3: Candor Toward the Tribunal
- ER 3.4: Fairness to Opposing Party and Counsel
- ER 3.8: Special Responsibilities of a Prosecutor
- ER 3.10: Credible and Material Exculpatory Information About a Convicted Person
- ER 8.4: Misconduct

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### Rule 15.1, Ariz. R. Crim. P.

- b. Supplemental Disclosure; Scope. Except as provided by Rule 39(b), the prosecutor shall make available to the defendant the following material and information within the prosecutor's possession or control:

...

(8) All then existing **material or information** which tends to **mitigate or negate** the defendant's **guilt** as to the offense charged, or which would tend to reduce the defendant's **punishment** therefor.

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### Rule 15.1, Ariz. R. Crim. P.

- f. Disclosure by Prosecutor. The prosecutor's obligation under this rule extends to material and information in the possession or control of any of the following:

(1) The prosecutor, or **members of the prosecutor's staff**, or,

(2) Any law enforcement agency which has participated in the investigation of the case and that is under the prosecutor's direction or control, or,

(3) Any other person who has participated in the investigation or evaluation of the case and who has been under the prosecutor's direction or control.

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### Brady, Giglio, and Progeny

- *Napue v. Illinois*, 360 U.S. 264 (1959)
  - *State v. Ferrari*, 112 Ariz. 324 (1975)
- *Brady v. Maryland*, 373 U.S. 83 (1963)
- *Giglio v. United States*, 405 U.S. 150 (1972)
  - *State v. Serna*, 163 Ariz. 260 (1990)
  - *State v. Lukezic*, 143 Ariz. 60 (1984)
- *United States v. Bagley*, 473 U.S. 667 (1985)
- *Kyles v. Whitley*, 514 U.S. 419 (1995)
- *Stickler v. Greene*, 527 U.S. 263 (1999)
- *Milke v. Mroz*, 236 Ariz. 276 (Div. 1, 2014)

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**Napue v. Illinois**, 360 U.S. 264 (1959)

## ■ Facts

- Napue was convicted for the 1938 murders of a Chicago policeman and a co-defendant during a botched robbery.
- The State's key witness at trial was another co-defendant, Hamer, who was serving 199 years for his participation in the murders.
- The prosecutor had promised Hamer leniency in exchange for his trial testimony against Napue.

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**Napue v. Illinois**, 360 U.S. 264 (1959)

## ■ Facts

- However, at trial the prosecutor asked Hamer:
  - Q: "Did anybody give you a reward or promise you a reward for testifying?"
  - A: "There ain't nobody promised me anything."
  - Q: "Have I promised you that I would recommend any reduction of sentence to anybody?"
  - A: "You did not."
- The prosecutor did nothing to correct these statements, which he knew to be false.

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**Napue v. Illinois**, 360 U.S. 264 (1959)

## ■ Holding

- "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. **A lie is a lie, no matter what its subject**, and, if it is in any way relevant to the case, the district attorney has the **responsibility and duty** to correct what he knows to be false and elicit the truth."
- 360 U.S. at 264 (quoting *People v. Savvides*, 11 NY 2d 554, 557).

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### *Napue v. Illinois*, 360 U.S. 264 (1959)




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### Arizona's "Napue" - Ferrari

- "Knowing use of perjured or false testimony by the prosecution is a denial of due process and is **reversible error without the necessity of a showing of prejudice** to the defendant."
- *State v. Ferrari*, 112 Ariz. 324, 334 (Ariz. 1975) (citing *Mooney v. Holohan*, 29 U.S. 103 (1935)).

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### Scenario #1

- In a bank robbery trial, the victim bank teller testifies that he was able to remember so much detail about the robbery because he had never been robbed before and the trauma burned the details into his mind.
- Hearing this testimony, assigned Victim Advocate Jones recalls a prior conversation with the victim bank teller that he'd been robbed at the bank a year earlier and decided that if it happened again he'd do everything he could to remember every detail about the robber.

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### Scenario #1

What should Victim Advocate Jones do?

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### *Brady v. Maryland*, 373 U.S. 83 (1963)

#### ■ Facts

- Brady and a co-defendant, Boblit, were tried and convicted for a murder committed during a robbery.
- They pointed the finger at each other as to the actual killing, but both were sentenced to death.
- Upon Brady's pre-trial request, the prosecution disclosed several statements by Boblit, except the one of him saying he was the one who killed the victim.
- Brady did not receive that statement until after he had been convicted, sentenced, and his conviction had been affirmed.

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### *Brady v. Maryland*, 373 U.S. 83 (1963)

#### ■ Holding

- "We now hold that the suppression by the prosecution of evidence **favorable to an accused** upon request violates due process where the **evidence is material either to guilt or to punishment**, irrespective of the good faith or bad faith of the prosecution."
- 373 U.S. at 87.

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## Brady v. Maryland, 373 U.S. 83 (1963)

### ■ Holding

- "Society wins not only when the guilty are convicted but when criminal trials are fair; **our system of the administration of justice suffers when any accused is treated unfairly.** An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.'"

• 373 U.S. at 87

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## Scenario #2

- After her testimony and in-court identification of the defendant as the person who burglarized her home, the victim tells Victim Advocate Thompson she looked up the defendant's booking photo on-line prior to testifying in court.
- She said she did it because she couldn't remember what the defendant looked like and wasn't sure if she identified the right person the night of the crime.

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## Scenario #2

How should Advocate Thompson handle this situation?

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**Giglio v. United States**, 405 U.S. 150 (1972)

## ■ Facts

- Giglio was convicted and sentenced to five years in prison for passing forged money orders.
- His conviction was based largely on the trial testimony of co-conspirator Taliento.
- Giglio had been indicted by one AUSA (DiPaola) who promised Taliento immunity in exchange for his testimony.
- Giglio was tried by a second AUSA (Golden), who did not disclose the agreement because AUSA DiPaola assured AUSA Golden he made Taliento no promises.

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**Giglio v. United States**, 405 U.S. 150 (1972)

## ■ Facts

- During cross-examination in Giglio's trial, Taliento was asked if he'd been promised he would not be prosecuted in exchange for his testimony against Giglio.
- Taliento said he had not been made such a promise (of immunity) and still believed he could be prosecuted.

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**Giglio v. United States**, 405 U.S. 150 (1972)

## ■ Holding

- "We do not ... automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . ' A finding of materiality of the evidence is required under *Brady*, .... A new trial is required **if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . '**"

• 405 U.S. at 157. (Internal citations omitted).

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### *Giglio v. United States*, 405 U.S. 150 (1972)

#### ■ Holding

- “[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. **The prosecutor's office is an entity and as such it is the spokesman for the Government.** A promise made by one attorney must be attributed, for these purposes, to the Government.”

• 405 U.S. at 154.

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### Arizona's “Giglio” - Serna

- “It is firmly established that the state cannot knowingly conceal any leniency agreement entered into with a material witness.”

• *State v. Serna*, 163 Ariz. 260 (1990) (citing *Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959); *State v. Holinger*, 115 Ariz. 89 (1977)).

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### Arizona's “Giglio” - Lukezic

#### ■ Facts

- Lukezic was tried and convicted of 11 crimes, including two counts of first degree murder and one count of conspiracy to commit murder.
- But the court ordered a new trial because the prosecution failed to disclose the following benefits it had provided to two of its key witnesses:
  - Facilitating one witness's car payments to avoid repossession,
  - Arranging for that witness to receive regular prescription drugs outside of ordinary jail custom, and
  - Significantly altering presentence reports to assure both key witnesses received certain sentences.

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## Arizona's "Giglio" - Lukezic

### ■ Holding

"In our prior cases, we have granted a new trial when the prosecution fails to disclose information vitally affecting the credibility of a key state witness. ... In affirming this order for a new trial, we feel compelled to express our disapproval of the conduct of the prosecution in this case. Whether these witnesses received benefits due to prosecutorial design or inexcusable neglect is immaterial, **because the prosecution is to blame** in either case. We certainly do not subscribe to the cavalier philosophy that the state can do no evil when acting in the name of the good."

143 Ariz. at 68.

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## Scenario #3

- Prosecutor A (assisted by Victim Advocate Sherman) is handling a domestic violence case in which the victim's former boyfriend (a well-known gang member) savagely beat her.
- At the same time, Prosecutor B is handling methamphetamine possession charges against the victim.
- A week before the domestic violence trial, the victim pleads guilty to her meth charges and her attorney asks Prosecutor B if he'll recommend just a year of probation since she'll be helping the State by testifying in the domestic violence case.
- Prosecutor B agrees and assumes he doesn't need to complicate Prosecutor A's case by telling her about the agreement.
- While speaking with Victim Advocate Sherman, the victim mentions how grateful she is for Prosecutor B's agreement.

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## Scenario #3

Should Advocate Sherman tell Prosecutor A about Prosecutor B's agreement?

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**Scenario #3**

Assuming Prosecutor A learns about Prosecutor B's agreement, does she have a duty to disclose it?

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**Scenario #3**

If Prosecutor A doesn't know about the agreement in the victim's drug case, does she still have a duty to disclose it to the defense in her domestic violence case?

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***United States v. Bagley*, 473 U.S. 667 (1985)**

- **Facts**

- Bagley was indicted on narcotics charges stemming from a federal investigation (ATF) that paid two state police officers to work undercover.
- Before trial, Bagley filed a motion requesting a list of witnesses and "any deals, promises or inducements made ... in exchange for their testimony."
- The prosecution gave Bagley signed affidavits from the two undercover officers stating,
  - "I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it."

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### United States v. Bagley, 473 U.S. 667 (1985)

#### ■ Facts

- Bagley was convicted based on the testimony of the two undercover officers.
- Years later, Bagley obtained (through a FOIA request) ATF contracts with the two undercover officers indicating they were paid \$300 for their undercover work and testimony against Bagley.
- Because these contracts were never disclosed to him, Bagley moved for his sentence to be vacated.

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### United States v. Bagley, 473 U.S. 667 (1985)

#### ■ Discussion

- "Impeachment evidence, ... as well as exculpatory evidence, falls within the *Brady* rule. ... Such evidence is 'evidence favorable to an accused,' ... so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. *Napue v. Illinois*, 360 U.S. 264, 269, ... (1959) ('The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend')."
  - 473 U.S. at 676

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### United States v. Bagley, 473 U.S. 667 (1985)

#### ■ Discussion

- "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to **undermine confidence in the outcome.**"

• 473 U.S. at 682.

#### ■ Holding

- The case was remanded "for a determination whether there is a reasonable probability that, had the inducement offered by the Government to [the two undercover officers] been disclosed to the defense, the result of the trial would have been different."

• 473 U.S. at 682.

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## Impeachment Evidence

- Evidence that demonstrates a witness
  - Is biased against either party;
  - Is prejudiced against either party;
  - Has a motive to fabricate or omit testimony;
  - Has a motive (possibly to receive a benefit) to testify favorably or unfavorably for either party;
  - Has a poor reputation for truthfulness;
  - Has been convicted of a felony or another crime involving dishonesty or false statements
  - Has made prior inconsistent statements, or
  - Was unable to perceive circumstances in the manner they claim

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## Scenario #4

- In a home-invasion/armed-burglary case involving a dangerous rip crew, a neighbor (the key witness) asks the victims services division of the prosecutor's office for help with his immigration status.
- The victims services division agrees to do so and was able to work out an agreement with Immigration and Customs Enforcement (ICE) without involving (or telling) Prosecutor Franklin, who is handling the case.
- The case proceeds to trial and during jury selection, the case agent mentions in passing to Prosecutor Franklin how lucky they were to keep the witness in the country for trial so they could keep this dangerous rip crew off the streets.

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## Scenario #4

What should Prosecutor Franklin do with this information?

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### **Kyles v. Whitley**, 514 U.S. 419 (1995)

#### ■ Facts

- Kyles was convicted and sentenced to death for the murder of a 60-year-old woman in a parking lot
- On review, it was discovered that despite its claim that there was "no exculpatory evidence of any nature," the prosecution had failed to disclose:
  - 1) Eye-witness statements taken after the murder;
  - 2) Inconsistent statements made by an informant known as "Beanie," who seemed eager to help the police arrest Kyles
  - 3) A list of license plates from other cars in the parking lot that did not include Kyles'; and
  - 4) Evidence linking "Beanie" to other crimes at that same location

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### **Kyles v. Whitley**, 514 U.S. 419 (1995)

#### ■ Discussion

- "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown **when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'**"
- 514 U.S. at 434 (citing *Bagley*, 473 U.S. at 678).

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### **Kyles v. Whitley**, 514 U.S. 419 (1995)

#### ■ Discussion

- "... [T]he individual prosecutor has a duty to learn of any favorable evidence **known to the others acting on the government's behalf in the case, including the police.** But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith...), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is **inescapable.**"
- 514 U.S. at 437-38.

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## Kyles v. Whitley, 514 U.S. 422 (1995)

### Holding

- "[T]he state's obligation under *Brady* ... to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government, and we hold that the prosecutor remains responsible for gauging that effect **regardless of any failure by the police to bring favorable evidence to the prosecutor's attention.** Because the net effect of the evidence withheld by the State in this case raises a reasonable probability that its disclosure would have produced a different result, Kyles is entitled to a new trial."

514 U.S. at 423-24.

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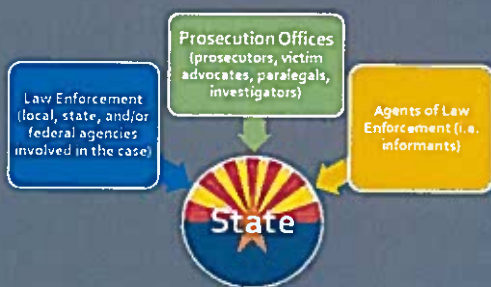
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## Who is the State?




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## Scenario #5

- Prosecutor Williams is handling a homicide case that involves several unsavory witnesses.
- The case agent tells Prosecutor Williams that after the murder (but before he came on to the case) some other detectives from his city agency (who work on a federal task force) did some investigation into one of the unsavory witnesses.
- The case agent does not know what the connection is to the homicide case.

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## Scenario #5

Does Prosecutor Williams have any kind of legal duty in this situation?

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## Stickler v. Greene, 527 U.S. 263 (1999)

### Facts

- The defendant was convicted and sentenced to death for the kidnapping, robbery, and murder of a college student
- A bystander testified in great detail about her observations of the kidnapping from a mall parking lot and identified the defendant as one of the kidnappers
- The prosecution maintained an "open file" policy and allowed defense counsel to review all evidence in the file
- However, the file did not contain (and they were never disclosed) a detective's notes from his interviews of the bystander and letters the bystander wrote to the detective
- The materials contradicted the bystander's detailed testimony, undermined her in-court identification of the defendant, and called into question her self-proclaimed "exceptionally good memory."

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## Stickler v. Greene, 527 U.S. 263 (1999)

### Discussion

- "There are three components of a true *Brady* violation: The evidence at issue must be **favorable to the accused**, either because it is exculpatory, or because it is impeaching, that evidence must have been **suppressed by the State**, either willfully or inadvertently, and **prejudice must have ensued.**"

• 527 U.S. at 282-82

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**Stickler v. Greene**, 527 U.S. 263 (1999)

## ■ Discussion

- "[T]he question is whether 'the favorable evidence could reasonably be taken to put **the whole case** in such a different light as to **undermine confidence in the verdict.**'"

• 527 U.S. at 290 (citing *Kyles*, 514 U.S. at 435)

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**Stickler v. Greene**, 527 U.S. 263 (1999)

## ■ Result

- After a review of all of the other evidence aside from the bystander's questionable testimony, the Court ruled, "[The defendant] has satisfied two of the three components of a constitutional violation under *Brady*: exculpatory evidence and nondisclosure of this evidence by the prosecution. ... However, [the defendant] has not shown that there is a reasonable probability that his conviction or sentence would have been different had these materials been disclosed. He therefore cannot show materiality under *Brady* or prejudice from his failure to raise the claim earlier. Accordingly, the judgment of the Court of Appeals [upholding the defendant's conviction] is *Affirmed*."

• 527 U.S. at 296.

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**Milke v. Mroz**, 236 Ariz. 276 (Div. 1, 2014)

## ■ Facts

- Milke was convicted and sentenced to death for her role in the kidnapping and murder of her four-year-old son.




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## Milke v. Mroz, 236 Ariz. 276 (Div. 1, 2014)

### Facts

- In addition to other circumstantial evidence linking Milke to the crime, Phoenix PD Detective Armando Saldate, Jr. testified that the defendant confessed her role in the conspiracy to kill her son.
- There was no audio recording of Milke's confession and Detective Saldate was the only witness to it.

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## Milke v. Mroz, 236 Ariz. 276 (Div. 1, 2014)

### Facts

- After 22 years on death row, the Ninth Circuit Court of Appeals granted the defendant a conditional writ of habeas corpus, setting aside her convictions and sentence.
- The Ninth Circuit ruled that the State failed to disclose *Brady/Giglio* material of Detective Saldate's "previous instances of improper conduct and lying under oath while on the police force."
- Milke v. Mroz*, 236 Ariz. at 280 (citing *Milke v. Ryan* (Milke II), 711 F.3d 998, 2004 (9th Cir., 2013))

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## Milke v. Mroz, 236 Ariz. 276 (Div. 1, 2014)

### Facts

- The Ninth Circuit held that MCAO failed to disclose Detective Saldate's instances of improper conduct (involving his interrogation methods and honesty):
  - State v. Jones* (1981): Saldate admitted interrogating an alleged wife who was subjected to a brutal beating, including being repeatedly suffocated with a pillow. The trial court subsequently suppressed the defendant's statements.
  - State v. Rodriguez* (1981): The trial court found Saldate told a grand jury that the murder victim had been shot four times, even though it was undisputed that the victim was shot only twice.
  - State v. Givens* (1981): Saldate interrogated a suspect in handcuffs who was not read rights and coercively obtained a confession. The trial court subsequently rejected the statements as involuntary.
  - State v. Stephens* (1981): The defendant found that Saldate lied in statements to the grand jury and the defendant did not know the truth and acted out of fear and confusion.
  - State v. Kerner* (1981): Saldate and a police officer used a translation to mislead the jury about the defendant's statements. The trial court held that Saldate used the false statements and that material was withheld from the jury, necessitating and mandating the case for a new trial as a possible result.
  - State v. Jones* (1981): In the course of a murder investigation, Saldate obtained an affidavit in place of a search warrant to search for evidence, where the affidavit was obtained by false statements. The trial court held that the affidavit was not proper and that the defendant was not read rights. The trial court suppressed the statements and the defendant was acquitted.
  - State v. Stephens* (1981): Saldate kept asking questions during the trial when the defendant indicated he no longer wanted to answer. The trial court ruled that those statements were inadmissible.

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## Milke v. Mroz, 236 Ariz. 276 (Div. 1, 2014)

### ■ Facts

- Additionally, Saldade's Phoenix PD disciplinary record included a 1973 incident involving a sexual quid pro quo with a female motorist.
- Saldade initially denied his involvement until a polygraph test revealed his dishonesty.
- One note in the file stated that "because of this incident, your image of honesty, competency, and overall reliability must be questioned."
- The Ninth Circuit said the State knew of this misconduct but failed to disclose it to Milke.
- During trial, Milke issued a subpoena for Saldade's personnel file, which the Phoenix PD successfully quashed.

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## Milke v. Mroz, 236 Ariz. 276 (Div. 1, 2014)

### ■ Arizona Division 1 Ruling

#### Knowledge of the Individual Prosecutor

- "For *Brady/Giglio* purposes, the [Phoenix PD] is part of the State and "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." 236 Ariz. at 282 (quoting *Kyles*, 511 U.S. at 412).
- "The extent of any individual prosecutor's knowledge of the misconduct is immaterial. Though in some cases an individual may be the focus of the inquiry, it is the duty of the state as a whole to conduct prosecutions honorably and in compliance with law." 236 Ariz. at 283.
- "[O]ur supreme court has emphasized—in a different context but quite relevant here—that "[a] prosecutor's office cannot get around *Brady* by keeping itself in ignorance or compartmentalizing information about different aspects of a case." 236 Ariz. at 283 (quoting *Luttrell*, 343 U.S. at 162).

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## Milke v. Mroz, 236 Ariz. 276 (Div. 1, 2014)

### ■ Arizona Division 1 Ruling

#### Duration of Duty to Disclose

- "The prosecution's *Brady/Giglio* obligations continue until all challenges to the conviction have been exhausted. See *Carlson v. Cole*, 210 Ariz. 598, 599, ¶ 8 (2005) ("The Court of Appeals found, and the State acknowledges, an ethical and constitutional obligation to disclose clearly exculpatory material that comes to its attention after the sentencing has occurred, and we affirm that the State does bear such a duty.") ... The nondisclosure by the State of the evidence impeaching Saldade persisted for years after the conclusion of the state court proceedings, until the evidence was finally discovered in the course of the federal habeas proceedings." 236 Ariz. at 283.

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### **Milke v. Mroz**, 236 Ariz. 276 (Div. 1, 2014)

#### ■ Arizona Division 1 Ruling

- "Because of the State's severe, egregious prosecutorial misconduct in failing to disclose impeachment evidence prior to and during trial and for years thereafter, double jeopardy bars retrial of Milke under our Arizona Constitution and Arizona Supreme Court precedent. We remand to the trial court for **dismissal with prejudice** of the pending charges against Milke."
- 236 Ariz. at 285.
- "In these circumstances—which will hopefully remain unique in the history of Arizona law--**the most potent constitutional remedy is required.**"
- 236 Ariz. at 283.

### **Milke v. Mroz**, 236 Ariz. 276 (Div. 1, 2014)

The Arizona Supreme Court denied review of Division One's ruling and denied the State's motion to de-publish the opinion.



### **Scenario #6**

- A jury convicted the defendant of Armed Robbery based on the victim's eye witness testimony.
- The defendant was sentenced to probation and her appeal is currently being considered by the state appellate court.
- After sentencing, the victim made comments to Victim Advocate Johnson that he was glad he could help convict the defendant because of her race.

## Scenario #6

Because the defendant has been convicted and sentenced, does Victim Advocate Johnson need to do anything with this information?

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## Victims' Rights and Due Process

- A victim does not become an agent of the state simply because of his or her cooperation with the police and/or prosecution.

State v. Avel, 111 Ar. 240, 243 (1974).

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## Victims' Rights and Due Process

- A.R.S. § 13-4430. Consultation between crime victim advocate and victim; privileged information; exception
  - A. A crime victim advocate shall **not disclose** as a witness or otherwise any communication made by or with the victim, including any communication made to or in the presence of others, unless the victim consents in writing to the disclosure.
  - B. Unless the victim consents in writing to the disclosure, a crime victim advocate shall **not disclose** records, notes, documents, correspondence, reports or memoranda that contain opinions, theories or other information made while advising, counseling or assisting the victim or that are based on communications made by or with the victim, including communications made to or in the presence of others.
  - C. The communication is **not privileged** if the crime victim advocate knows that the victim will give or has given **perjured testimony** or if the communication contains **exculpatory evidence**.

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## Victims' Rights and Due Process

- A.R.S. § 13-4439, Consultation between crime victim advocate and victim; privileged information; exception (continued)
- ...
- D. A defendant may make a motion for disclosure of privileged information. If the court finds there is reasonable cause to believe the material is **exculpatory**, the court shall hold a hearing in camera. **Material that the court finds is exculpatory shall be disclosed to the defendant.**
- E. If, with the written or verbal consent of the victim, **the crime victim advocate discloses to the prosecutor or a law enforcement agency** any communication between the victim and the crime victim advocate or any records, notes, documents, correspondence, reports or memoranda, the prosecutor or law enforcement agent shall disclose such material to the defendant's attorney **only if** such information is otherwise **exculpatory**.

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## State ex. rel. Romley v. Gottsfield (Roper),

172 Ariz. 232 (Div. 1, 1992)

- **Facts**
- Roper was charged with aggravated assault after stabbing her husband with a knife.
- She claimed self-defense and moved for disclosure of her (victim) husband's medical records to establish her defense and for impeachment purposes.
  - Roper claimed her husband physically and emotionally abused her during their marriage and had been treated for multiple personality disorder for over 12 years. This night, she called 911 saying he was "killing" her and threatening her with a knife. She claimed she stabbed him to defend herself from one of his violent personalities.
- The trial court granted the defendant's motion for disclosure and the state petitioned for special action.

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## State ex. rel. Romley v. Gottsfield (Roper),

172 Ariz. 232 (Div. 1, 1992)

- **Holding**
- "If the defendant's need to effectively cross-examine and impeach the victim in order to establish a justification defense requires access to the medical records before trial in order for her expert witness to review these records in order to testify regarding the justification defense of self-defense, then **the Victim's Bill of Rights must yield** to the federal and state constitutions' mandates of due process of law so that the defendant is able to present her theory of self-defense, which she has adequately raised on the facts presented here."
- 172 Ariz. at 240-41

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**State ex. rel. Romley v. Gottsfield (Roper),**

172 Ariz. 232 (Div. 1, 1992)

■ **Holding**

- "[T]he [Victim's Bill of Rights] should not be a sword in the hands of victims to thwart a defendant's ability to effectively present a legitimate defense. Nor should the amendment be a fortress behind which prosecutors may isolate themselves from their constitutional duty to afford a criminal defendant a fair trial."
- 172 Ariz. at 241.
- "We therefore hold that when the defendant's constitutional right to due process conflicts with the Victim's Bill of Rights in a direct manner, such as the facts of this case present, then **(the defendant's) due process is the superior right.**"
- 172 Ariz. at 236.

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**State v. Connor**, 215 Ariz. 553 (Div. 1, 2007)■ **Facts**

- The victim, an intellectually and emotionally challenged young man, was stabbed to death with 84 wounds. Connor's DNA was found at the scene.
- Connor initially denied knowing the victim or being at his apartment but later admitted to stabbing him to death, claiming he acted in self-defense.
- Prior to trial, Connor moved for disclosure of "any and all medical treatment, counseling, psychological and/or psychiatric records" of the victim.
- He argued the information "may be exculpatory and will likely solidify the Defendant's position that the decedent was the initial aggressor."

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**State v. Connor**, 215 Ariz. 553 (Div. 1, 2007)■ **Holding**

- "**Roper, ..., did not authorize a wholesale production of the victim's medical records to the defendant.**"
- 215 Ariz. at 557.
- "[I]n this case, Defendant presented no sufficiently specific basis to require that the victim provide medical records to the trial court for an *in camera* review. Here the Defendant makes no showing that the victim's physician-patient privilege may have been waived as to him, nor does he make any otherwise adequate showing that the information sought might contain materials necessary to fully present his justification defense or to the cross-examination of witnesses."
- 215 Ariz. at 558.

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## Review

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## General *Brady/Giglio* Standard

- The State must disclose evidence in its possession that is favorable to a defendant and is material to guilt or to punishment
- This includes exculpatory evidence, impeachment evidence, and other evidence that would affect witness credibility or "put the whole case in such a different light as to undermine confidence in the verdict"
- An individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including law enforcement
- *Brady/Giglio* obligations continue until all challenges to the conviction have been exhausted
- The good or bad faith of the prosecution is irrelevant

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## Due Process Requires...

- Disclosure of evidence favorable to the defendant that is material to guilt or punishment  
*Brady v. Maryland*, 373 U.S. 83 (1963)
- Disclosure of material evidence that could "in any reasonable likelihood have affected the judgment of the jury"  
*United States v. Smith*, 401 U.S. 196 (1970)
- Disclosure (even absent a request) of exculpatory evidence that would raise a reasonable doubt as to the defendant's guilt  
*United States v. Agurs*, 427 U.S. 97 (1975)
- Disclosure of material evidence "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" such that it "undermines confidence in the outcome of the trial."  
*United States v. Bagley*, 473 U.S. 667 (1985)

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## Due Process Requires...

- Disclosure of "favorable evidence [that] could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict"  
*Kyles v. Miller*, 514 U.S. 419 (1995)
- Disclosure of perjury and correction of false or misleading testimony from a government witness  
*Nguyen v. United States*, 391 U.S. 251, 266-67; *State v. Finner*, 128 Ariz. 322 (1989); *State v. Gonzalez*, 100 Ariz. 393 (1981)
- Disclosure of impeachment evidence  
*United States v. Hughes*, 511 U.S. 187 (1994)
- Disclosure of any type of benefit given to a government witness  
*State v. Smith*, 121 Ariz. 60 (1974)
- Disclosure of contents of plea agreement(s) and/or leniency agreements with government witnesses  
*Grady v. United States*, 494 U.S. 558 (1990); *State v. Gonzalez*, 121 Ariz. 60 (1974); *State v. Smith*, 121 Ariz. 60 (1974)
- Disclosure of the identity of an undercover informant who was a material witness to the charged offense(s), even if that informant will not be called to testify  
*Romero v. United States*, 357 U.S. 399 (1958)

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## Due Process Requires...

- Delay in deportation process of alien witness(es) who would be "material and favorable" to the defense (not merely cumulative) where "there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact"  
*United States v. Villanueva-Perez*, 658 U.S. 85 (1989); *State v. Smith*, 121 Ariz. 260 (1974)
- Disclosure of Brady material for post-conviction proceedings  
*Banks v. Greer*, 540 U.S. 418 (1993); *State v. Alvarado*, 270 Ariz. 3 (2015)
- Disclosure of Brady material in possession of the police (or its agents), regardless of the knowledge of the individual prosecutor  
*Ex parte Whitney*, 521 U.S. 473 (1997); *State v. Smith*, 121 Ariz. 260 (1974); *State v. Smith*, 121 Ariz. 260 (1974)
- Disclosure of findings of past or present misconduct or untruthfulness of any officer involved in the case (Rule 35 Database)  
*Brady v. Maryland*, 393 U.S. 83 (1968); *State v. Alvarado*, 270 Ariz. 3 (2015)
- That a defendant be given "a meaningful opportunity to present a complete defense"  
*Hovatta v. South Carolina*, 547 U.S. 394, 399 (2005); *State v. Smith*, 121 Ariz. 260 (1974)

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## Due Process Does Not Require...

- Preservation of investigator notes destroyed "in good faith and in accord with their normal practice," so long as the contents of the notes were full, incorporated into the investigator's report  
*Palmer v. Houston*, 301 U.S. 231 (1931)
- Preservation of every piece of evidence unless it "might be expected to play a significant role in the suspect's defense," its exculpatory nature was apparent before it was destroyed, and it is of "such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."  
*California v. Trombetta*, 467 U.S. 476 (1984)
- "[A] complete and detailed accounting to the defense of all police investigator work on a case"  
*State v. Brown*, 434 U.S. 224 (1977)
- Routine disclosure of law enforcement personnel files absent a threshold showing of "materiality" by the defendant  
*State v. Alvarado*, 270 Ariz. 3 (2015)
- Communications between a victim to a victim advocate unless the communication contains exculpatory evidence or the victim advocate finds that the victim will give or has given perjured testimony  
A.R. § 12-1-45(B)

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### Scenario #7

- During the afternoon break in trial, Victim Advocate Webster is in the restroom and overhears the victim talking to another one of the State's witnesses about the details of his upcoming trial testimony.
- Disclose to the prosecutor?

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### Scenario #8

- During a pre-trial meeting, the victim tells Victim Advocate Smith that the shooting didn't happen exactly the way he told the police it did.
- The victim says he'd like to change his statement.
- Disclose to the prosecutor?

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### Scenario #9

- During a pre-trial meeting in a domestic violence case, the victim shows Victim Advocate Carson a series of post-incident Facebook messages between her and the defendant.
- As she glances at the screen, Advocate Carson sees a message in which the victim apologizes for slapping the defendant in the face before he beat her.
- Disclose to the prosecutor?

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### Critical Question

If you were falsely accused of a crime, how would you want the prosecution team handling your case to behave?

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